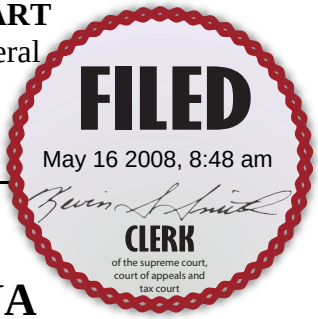
ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana



IN THE
COURT OF APPEALS OF INDIANA

PAUL A. LUCAS III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0801-CR-57
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald Johnson, Judge
Cause No. 79D01-0702-FB-4

May 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Paul A. Lucas III challenges his sentence for class B felony neglect of a dependent. We affirm.

Issue

The sole issue is whether the trial court violated the terms of Lucas's plea agreement when it sentenced him to five years in community corrections in addition to ten years executed.

Facts and Procedural History

On February 5, 2007, Lucas was in the apartment he shared with his wife Samantha and his nine-month-old stepson C.S. After Samantha went to bed, Lucas smoked marijuana and played with C.S. While playing a game in which he repeatedly tossed C.S. into the air, Lucas dropped C.S., who sustained a broken leg, a contusion on his head, and bleeding from his mouth and gums.

On February 22, 2007, the State charged Lucas with class B felony neglect of a dependent, class B felony battery resulting in serious bodily injury, and class A misdemeanor possession of marijuana. At a hearing on August 10, 2007, Lucas pled guilty pursuant to a plea agreement, which provided,

> 1. The defendant shall plead guilty to Count 1, Neglect of a Dependent, a Class B felony.
>
> 2. The defendant shall receive such sentence as this Court deems appropriate after hearing any evidence or argument of counsel. However, any executed portion of the sentence shall not exceed ten (10) years.

> 3. The victim's immediate family members and service providers shall have the right to make sentencing recommendations and present testimony at sentencing.
>
> 4. As a condition of any probation or parole that may be granted, the defendant shall have no contact with, directly or indirectly, with Samantha Campbell Lucas, [C.S.] or any members of their immediate family or household.

Appellant's App. at 9.

At the sentencing hearing on September 7, 2007, Lucas agreed to be bound by the terms of probation. Tr. at 49. Following the hearing, the trial court sentenced Lucas in pertinent part as follows:

> The Court finds the following aggravating factors: The defendant scored high on the LSI-R. The offense is non-suspendible [sic] and the victim was under the age of twelve (12).
>
> The Court finds the following mitigating factors: The defendant suffers from mental illness.
>
> The Court finds the aggravating factors outweigh the mitigating factors and sentences the defendant to the Indiana Department of Correction for a period of fifteen (15) years. The Court now finds that ten (10) years of said sentence should be and hereby are ORDERED executed. Five (5) years of said sentence should be and hereby are ORDERED suspended and defendant placed on supervised probation for fiver [sic] (5) years. As a condition of probation, the defendant is to complete five (5) years at Tippecanoe County Community Corrections at a level to be determined by them, in cooperation and consultation with the ACT Team through Wabash Valley Hospital. As a further condition of probation, the defendant is not allowed to be alone with any children under the age of sixteen (16) years of age. The defendant shall follow all rules and regulations of the Tippecanoe County Probation Department.

Appellant's App. at 63-64. As part of the sentencing order, the remaining counts against Lucas were dismissed. *Id*. at 65. On October 29, 2007, the trial court granted Lucas's motion for belated appeal.

Discussion and Decision

"'A plea agreement is contractual in nature, binding the defendant, the State and the trial court.'" *Addington v. State*, 869 N.E.2d 1222, 1223 (Ind. Ct. App. 2007) (quoting *Debro v. State*, 821 N.E.2d 367, 372 (Ind. 2005)). "If the trial court accepts a plea agreement, it shall be bound by its terms." Ind. Code § 35-35-3-3(e).

Lucas contends that the trial court violated the terms of his plea agreement by sentencing him to five years of community corrections in addition to his ten-year executed sentence. He asserts that the five years in community corrections constitutes an executed term which, when added to the ten years in the Department of Correction, results in a total executed sentence of fifteen years.

In *Shaffer v. State*, 755 N.E.2d 1193 (Ind. Ct. App. 2001), we specifically addressed whether placement in a community corrections program constitutes executed time or suspended time. Shaffer's plea agreement contained a three-year cap on executed time. The trial court's sentencing order provided for two years executed and four years suspended to probation, "with seven hundred and thirty days [of the] probation on work release after the incarcerated time with conditions of probation." *Id*. at 1194. On appeal, Shaffer argued that the imposition of work release time, even when couched as a condition of probation, was actually executed time and that he therefore received four years of executed time in contravention of the plea agreement. *Id*. This Court affirmed Shaffer's sentence, holding "that a person is serving the executed portion of this sentence when he is committed to the Department of Correction … and that the portion of a defendant's sentence involving placement on work release does not constitute a part of the executed sentence." *Id*. at 1195.

The Court relied on language found in Indiana Code Section 35-38-2.6-4 ("If the court places a person in a community corrections program …, [it] shall suspend the sentence for a fixed period ….") and Indiana Code Section 35-38-2.6-5 (if a person violates a term of work release placement, the trial court has the option to "revoke the placement and commit the person to the department of correction for the remainder of the person's sentence"). The *Shaffer* court thus concluded that the imposition of two years of work release, when added to two years executed to the Department of Correction, did not violate the plea agreement's three-year cap on the executed portion of Shaffer's sentence. *Id*.[1]

Here, Lucas's plea agreement reserved to the trial court's discretion all sentencing matters except for a ten-year cap on the executed portion of his sentence. Appellant's App. at 9. The trial court's sentencing order imposed ten years executed to the Department of Correction followed by five years in Tippecanoe County Community Corrections "[a]s a condition of probation, … at a level to be determined by them, in cooperation and consultation with the ACT Team through Wabash Valley Hospital." *Id*. at 64. Based on our holding in *Shaffer*, we conclude that the trial court did not violate the plea agreement's ten-year cap on the executed portion of Lucas's sentence.

Affirmed.

BARNES, J., and BRADFORD, J., concur.

[1] Judge Vaidik concurred in result, reasoning that a distinction should be made between direct placement in community corrections programs, which should be deemed executed, and community corrections placement as a condition of probation, which should be deemed suspended. *Shaffer*, 755 N.E.2d at 1195 (Vaidik, J., concurring in result). Here, the trial court's sentencing order specifically states that Lucas's community corrections placement is a condition of probation, Appellant's App. at 64, and Lucas agreed to be bound by the terms of his probation. Tr. at 49.